APPENDIX A

LAW OFFICES OF
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Washington, D. C. 20006

November 26, 1965

Federal Trade Commission
Washington, D. C. 20580

Attention: Joseph W. Shea, Secretary

Re: United Biscuit Company of America, a corporation, Docket No. 7817.

Gentlemen:

This is an application to stay the effective date of the Commission's order issued against United Biscuit Company of America (United) in Commission Docket No. 7817.

SUMMARY STATEMENT

United is in the business of manufacturing and selling cookies and crackers, commonly referred to as biscuit products. There are three nationwide, or virtually nationwide, sellers of cookies and crackers: National Biscuit Company (National), Sunshine Biscuits, Inc. (Sunshine), and United. These three sellers account for about 65% of total industry sales. National is by far the dominant company in the industry. Its sales are over 60% of the combined sales of the three leading companies. Sunshine is the number two company. United, a poor third, competes with National and Sunshine wherever United sells.

The Commission's case against United involved volume discounts, a practice initially originated by National and used by all major sellers in the industry for a quarter of a century. Although broad Section 2(a) orders were issued by the Commission against National and Sunshine

more than ten years ago against the granting of such discounts, those two companies have given and still continue to employ them. As more fully shown below, each of the companies now gives discounts and allowances which, in practical effect, result in a total discount ranging up to 6% (plus a 1% cash discount) of accumulated monthly purchases.

THE BISCUIT INDUSTRY

National's 1964 sales were $607.5 million, its 1964 profits were $36.5 million, and its assets were then $330 million. Sunshine's 1964 sales were $207 million, its 1964 profits were $7.3 million and its assets were then $101.3 million. United's 1964 sales were $126.6 million, its profits $1.1 million, and its assets were then $56.4 million. National's sales are thus 65% of the total sales of the three companies, Sunshine's 21% and United's less than 14%. (See enclosed chart showing annual sales of these three companies from 1955 to 1964.)

While National's 1964 sales were almost 5 times those of United, its profits were more than 30 times United's profits. And while Sunshine's sales are somewhat less than double United's sales, Sunshine's 1964 profits were approximately 7 times United's profits. More significant is the fact that sales and profits have increased for National and Sunshine, but have declined for United during the past decade.

National's sales have climbed from $389 million in 1955 to $452 million in 1960 to $607 million in 1964; its profits jumped from $18 million in 1955 to $30 million in 1960 and then to $36.5 million in 1964. Sunshine's sales went from $119 million in 1955 to $193 million in 1960 to $207 million in 1964; its profits increased from $6 million in 1955 to $8 million in 1960 and then to $7.3 million in 1964.

United, on the other hand, had 1955 sales of $127 million, which increased to $131 million in 1960, but then dropped to $126 million in 1964; its profit fell from $3.6 million in 1955 to $2.4 million in 1960, and then further declined to $1.1 million in 1964.

There have been changes in the discount schedules of each of the three companies over the years, but basically each company has been doing substantially the same thing since before the Commission issued its complaint against National over 20 years ago. The Commission has attacked the discount schedules of each of the 3 companies. The first complaint was issued against National, presumably because of its dominant position, 22 years ago. The complaint against Sunshine issued 11 years ago and against United 5 years ago. The language of the orders against each company is without significant difference, but because the National and Sunshine orders issued before the enactment of the Finality Act of 1959, those orders are in effect sterile, leaving the 2 companies free, if they choose to do

so, to ignore the Commission's orders without penalty. The order against United, however, carries the severe penalties of the 1959 Act.

PROCEEDINGS AGAINST NATIONAL

On July 20, 1943, the Commission issued its complaint against National, Docket No. 5013, charging a violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, by National by discriminating in price among competing customers through the use of its quantity discount schedule in the sale of biscuits and crackers. On February 23, 1944, on a stipulation of facts, the Commission issued an order to cease and desist against National. The order is reported at 38 F.T.C. 213. On April 26, 1954, the Commission modified its order against National. The modified order is reported at 50 F.T.C. 932. In pertinent part, the modified order directs National to cease and desist, in the sale of bakery packaged food products, from selling such products at uniform prices "and thereafter granting varying discounts therefrom in the manner" found in the findings (which were volume discounts, described in 38 F.T.C. at pp. 220 and 221) or "*otherwise discriminating in price between purchasers of bakery packaged food products of like grade and quality where said purchasers in fact compete in the sale and distribution of such products.*" (Emphasis added)

The continued use of discounts by National and the status of the matter in the Commission during the last 16 years are reported in detail by Dr. Corwin D. Edwards in his book, *The Price Discrimination Law,* published in 1959. Dr. Edwards (former Commission Chief Economist) states that in 1949 the Compliance Division of the Commission challenged National's continued use of the discounts, that National made changes in its discount schedules, that in 1956, at the Commission's request, National filed an additional compliance report, and that when the book was

written National's "latest discount structure was being discussed with the Commission." (pp. 257-9) Dr. Edwards also reviews the data National submitted in support of its contentions as to the validity of the various discounts, and states in a footnote that National "asserted that its present discount structure is amply cost justified by a cost study made in 1949 but has not chosen to submit the evidence as to cost or to rest its case on this ground."

Nine years after the Commission directed National to file, within 60 days, "a report in writing setting forth in detail the manner and form in which it has complied with this modified order," the Commission formally stated that, "under the modified order [in *National*] no report of compliance has been received and filed as showing compliance."[1] Now, 2½ years later and more than 12 years after the issuance of the Commission's modified order, we are advised that no report by National of compliance with the modified cease and desist order has been received and filed showing compliance.

[1] Opinion dated April 19, 1963 in Docket No. 7817.

NATIONAL'S PRESENT DISCOUNTS

National's printed price list, dated April 1, 1964, publicly and openly disseminated to the trade, states the availability of the following discounts based upon monthly purchases, going up to 6% (exclusive of the 1% cash discount):

Discounts		*Rate*
Store:	$ 1.00 to $ 19.00	None
	20.00 to 34.00	1%
	35.00 to 49.00	1½%
	50.00 to 74.00	2%
	75.00 and over	3%
Quantity:	$ 1.00 to $499.00	None
	500.00 and over	1%

Allowances	
Advertising	1%
Promotion	1%

This is the same volume discount schedule that Dr. Edwards reports National put into effect on January 1, 1954. (p. 258)

PROCEEDINGS AGAINST SUNSHINE

On March 11, 1954, the Commission issued a complaint against Sunshine, Docket No. 6191, charging a violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, by discriminating in price among grocery store customers through the use of volume discounts in the sale of bakery packaged products, including cookies and crackers. The initial decision of the Hearing Examiner was adopted by the Commission on July 30, 1955, and is reported at 52 F.T.C. 110. That proceeding, too, was disposed of by a stipulation which provided for a consent order. The Commission's order directed Sunshine to cease and desist, in the sale of bakery packaged food products, "from discriminating in price, directly or in-

directly, between said purchasers of said products by selling such products of like grade and quality to any purchaser at a price different from that granted any other purchaser who in fact competes with the former in the sale or redistribution of such products."

The Commission publicly stated in 1963 that in *Sunshine*, "no report of compliance had been received and filed as showing compliance." (*Ibid.*) We are advised that as of the present no report of compliance has been received and filed showing compliance.

The Commission further publicly stated in 1963, "in other words, the reports in both matters [*National* and *Sunshine*], aside from the report received prior to modification in *National Biscuit*, have not been formally acted upon by the Commission and are still pending before it for consideration." (*Ibid.*)

SUNSHINE'S PRESENT DISCOUNTS

Sunshine's written price list, dated June 9, 1964, publicly and openly disseminated to the trade, states the availability of the following discounts totaling 6% based upon monthly purchases (plus the 1% cash discount):

Store Discount	
$15 to $29.99 Individual Store Volume	2% store discount
$30 and over Individual Store Volume (Store purchases will be averaged quarterly.)	3% store discount

Quantity Discount	
$500 and over monthly	1% quantity discount

Advertising & Sales Promotion	
When earned	2%

PROCEEDINGS AGAINST UNITED

The Commission issued its complaint against United on March 10, 1960. Its cease and desist order issued February 7, 1964, was affirmed by the Court of Appeals for the Seventh Circuit August 11, 1965, and that Court thereupon issued its order in the same language as the order of the Commission. On October 25, 1965, the Supreme Court extended the time for United to file a petition for certiorari to December 13, 1965. A petition for certiorari will be filed within that time.

Like the *National* and *Sunshine* cases, the United complaint attacks volume discounts as violations of Section 2(a) of the Robinson-Patman Amendment to the Clayton Act, and the order—directed to second line competition—is substantially in the language of the statute.

UNITED'S PRESENT DISCOUNTS

As the Commission's opinion in this case states, United's volume discounts to purchasers at the time the complaint issued ranged up to 6%. United's discount schedule currently in effect, issued March 4, 1965, is as follows (exclusive of the 1% cash discount):

Monthly Purchase	*Discount*
Store Discount	
$ .00 to $ 19.99	0%
20.00 to 34.99	2%
35.00 to 49.99	2½%
50.00 to 74.99	3%
75.00 to 500.00	4%
Quantity Discount	
$ .00 to $499.99	0%
500.00 and over	1%
Advertising Allowance	1%

VOLUME DISCOUNT EFFECT ON COMPETITION

Each of the three companies gives its customers in effect discounts going up to 6% (and a 1% cash discount) on accumulated monthly purchases. It is National, however, the dominant company in the industry, which derives the principal economic benefit from them.

Just this month the Commission said of quantity discounts:

> The Commission has noted in the past and we now hold that quantity discounts have an inherent "tying" effect in that they encourage a purchaser to confine his purchases to a single seller or a small number of sellers so that he will obtain the maximum discount, and that this is one of the principal purposes of such discounts. (Opinion, p. 31, *Dean Milk Company*, Dkt. No. 8032, released November 5, 1965.)

Monthly graduated volume discounts necessarily give the greatest advantage to the seller which has the largest sales volume; and it follows that the further advantage of the "tying" effect is enjoyed to the greatest extent by the dominant seller, which has the most complete line of products and the most highly advertised brand name, and not by a seller which is a poor third in the industry and whose sales have been declining. A seller having lower sales volume and lacking the same "tying" effect obviously reaches fewer customers in the higher bracket and maximum discount range (or in other words the same net price) as the dominant seller although the same list prices and discounts are used. Volume discounts, therefore, do not provide for and in fact deter competition on an item-by-item basis.

National is United's prime competitor. As the dominant seller in the industry, it has inherent competitive advantages over United. This is shown by the fact that National's 1964 profits were 6% of its sales, while United's were but

1%. National sells its products in every area and community where United sells, and it outsells United in almost every one of these markets. This is *not* a case where the difference in sales volume between the larger and the smaller company is due to the fact that the smaller company simply markets in a small geographic area in which it enjoys a sales volume equal to its large rival.

United receives no competitive advantage from its volume discount practices in regard to its two largest competitors. It merely reduces its competitive disadvantage. But United's competitive disadvantage will be catastrophic if it is required to discontinue giving monthly graduated volume discounts while its competitors, particularly the dominant seller, continue to grant them.

The 1% "quantity" discount which all three sellers give on sales of $500 and over is measured, by each, by the combined purchases of chain buyers, or voluntary groups. This sum is paid directly to headquarters. Thus again United will be at a great competitive disadvantage if its dominant competitors continue to pay, but it must give up paying, 1% of total combined purchases to the headquarters of each chain buyer and voluntary group. These payments are now no advantage to any seller, since all give the same proportionate payment, but for United to be compelled to give up the practice while its larger competitors continue the practice would give those competitors a further and overwhelming competitive advantage in numerically large and most important customer groups representing three quarters of United's sales.

The balance of National's discount, a 1% monthly advertising allowance paid for merely running two ads a month and 1% monthly promotional allowance paid on an automatic basis unless the salesman sends in a report that the customer did not promote National's product that month, are also computed on the basis of the monthly

volume of purchases and, therefore, again give the dominant seller the advantage.

Thus, even with both companies giving discounts, National has a decided competitive advantage; but it would cripple United's ability to compete if National had both the advantage inherent in being the dominant seller giving a volume discount and the additional advantage of its smaller competitor not being able to give a similar discount. This would be too much for United to be able to compete. To put these discounts in perspective, we point out that United's discount payments over the year are several times its total annual net profit. Were United now to be required to abandon its volume discounts while National and Sunshine were permitted to continue theirs, the only alternative for United would be to give a flat across-the-board reduction in price equivalent to the competitor's maximum discount to every one of its customers. The additional annual amount which would have to be paid out over the cost of United's present graduated volume discount would exceed the total net profit which United earned in 1964. United thus would incur heavy loss of revenue with no possibility that that loss would be in any manner offset by increased sales, since in effect the maximum graduated discount would be paid to all customers whether or not they had the capacity or potentiality to increase their purchases. Obviously, United could not continue in business under such conditions.

Further, we deem it important to note that if United were required to abandon its volume discounts, that action would not encourage National or Sunshine to follow suit. On the contrary, those companies would have every incentive to retain their discounts as long as possible in order to exploit their overpowering competitive advantage against United.

UNITED'S POSITION ON ELIMINATION OF VOLUME DISCOUNTS IN THE INDUSTRY

In the light of the industry structure, the economic effects of volume discounts, and the action already taken by the Commision, United assumes that the Commission's ultimate goal is to eliminate the use of such discounts in the industry.

For its part, United does not disagree with that objective on an industry-wide basis. *United is willing to discontinue all volume discounts as soon as it can competitively do so.* In the event that the existing order against it becomes final, United will file a report of compliance with the Commission stating that United will give up all volume discounts as soon as National and Sunshine do so; for, as pointed out above, while United enjoys no advantage from such discounts, it nevertheless cannot survive the competitive disadvantage of not granting such discounts as long as its major competitors, National and Sunshine, continue to grant them.

EFFECT OF UNCERTAINTY CONCERNING NATIONAL's AND SUNSHINE'S DISCOUNTS

United has been deprived of a clear-cut prior determination of validity or invalidity of the discounts of the two leading companies in the industry, National and Sunshine. The uncertainty concerning the Commission's present and future position on the discounts of those companies has impaired the use of and continues to present a formidable problem in regard to the applicability of the statutory defenses of cost justification and meeting competition. United has always had to face the fact that there was the possibility that National's and Sunshine's present volume discounts, or some altered version of them, might be held to be lawful on some basis and permitted under the orders outstanding against these companies.

One key to the legality of National's and Sunshine's discounts would be the determination of whether the discounts could be cost justified. United's sales, distribution and delivery system is comparable to that of National and Sunshine. Given the basis on which National or Sunshine has or can cost justify its volume discounts to the satisfaction of the Commission, United believes it can similarly cost justify like discounts. But United does not know whether National or Sunshine has submitted cost studies to the Commission, or if they have what views the Commission holds as to the propriety of those studies as cost justifying these discounts.

Similarly, although the Supreme Court's opinion in *Ruberoid* makes clear that the Section 2(b) defense of the Clayton Act is written into the order issued in this case and that United, therefore, has the right in good faith to meet the equally low net prices of National and Sunshine, including all discounts and allowances making up net price, we are not unmindful of the Commission's decisions that (a) meeting the equally low price of a competitor must be done in individual competitive situations and (b) the seller may not meet a lower price which he knows, or has reason to believe, is unlawful.

United's products sit side by side on the grocer's shelves with National's products; and, as noted above, United cannot effectively compete with this dominant competitor, National, on less favorable terms than National offers to the customer. In actual practice, monthly volume discounts can be competitively dealt with only by similarly granting monthly volume discounts and not by attempting to meet the resulting net prices for each item purchased by each customer which will be determined by the operation of the competitor's graduated volume discount at some later date. United has well over 100,000 customers. Thus the problems of getting out a new price schedule are substantial: a major undertaking is required simply to

brief United's sales force of well over 1,000 salesmen on a new price schedule. United, therefore, cannot competitively revise its price schedules for each product for individual customers on a day-to-day basis; it must know the prices under which it can do business. Nor is it feasible to have detailed reports on National's and Sunshine's sales volume with each United customer to determine their net prices. Virtually no customer will supply that information. They will simply discontinue buying from United if United's prices are higher.

The existence of orders against National and Sunshine, which have been in effect for more than ten years without any indication from the Commission that it considers the prices of those companies to violate these orders, could conceivably lead a reasonable and prudent businessman to believe that the Commission does not find the net prices of either National or Sunshine unlawful. On the other hand, the fact that the reports of compliance of both National and Sunshine have not been acted upon in the long intervening period raises serious doubts.

UNITED'S IMPOSSIBLE LEGAL SITUATION

The order against United puts the company in a precarious legal position. The Commission's orders against National and Sunshine were issued prior to the enactment of the Finality Act of July 23, 1959, so the Commission's only remedy for a violation of those orders is an application to a court of appeals for enforcement. In pressing for enactment of the finality statute, the Commission told Congress that the prior procedure gave a respondent "three bites at the cherry." But it appears that National has been "nibbling" at the cherry for twenty years. As long as the Compliance Division continues to study National's various reports of compliance, National (and Sunshine) are subject to no penalties whatever for their volume discount schedules even though there are patent violations of

both the statute and the order. Since 1959 those companies have been in a decidedly better position than if the Commission had never issued a complaint against them.

Unfortunately for United, and its ability to be competitive in this industry, it was not sued until long after its two larger competitors and the order against it was issued after the enactment of the Finality Act. Thus violations of the order by United, if and when it becomes final, will make it subject to civil penalties of up to $5,000 for each violation.

While United clearly has the right to meet National's (and Sunshine's) lower net prices, the Commission apparently would deny it that right if United has reason to believe that those prices are unlawful. Yet United needs the reports of compliance of those companies, which have expressly been denied to it, to know what are in fact the net prices of those competitors and to consider the propriety of those prices. And United should know whether the Commission views those prices as lawful—a determination the Commission has not made although it has been studying the issue for at least eleven years (seventeen years according to Dr. Edwards).

In its order of April 10, 1964 in this case, the Commission said that, "respondent [United], with the issuance of the price discrimination order against it, is now more nearly on a par with its major competitors [National and Sunshine] who have been operating under prohibitions of this nature for some time." Unless the Commission meant by that statement to hold that National and Sunshine were in fact then in compliance with the existing orders against them, the statement is unfair. For, as we have shown above, those competitors may, if they choose, ignore the existing orders against them with impunity, while United is subject to the drastic penalties of the 1959 Act.

United cannot, in the interest of its own competitive survival, sit by passively while its major competitors continue with impunity to grant discounts up to 6%, while it is compelled to discontinue doing so. United's very survival compels it to pursue every means to avoid this inequity.

THE RELIEF SOUGHT

United is willing to abandon all volume discounts as soon as its dominant competitors competively permit it to do so. Therefore, United respectfully asks the Commission to modify the order against United in Docket No. 7817, if it should become final, to postpone the effective date thereof until sixty (60) days after such time as National and Sunshine are found by the Commission to be in compliance with the orders heretofore issued against them, and United has been so advised. This may result from either (a) the Commission finding that their present volume discount schedules are not prohibited by the respective orders against them, or (b) each of them voluntarily adopts a price schedule which does comply with the orders, or (c) a court of appeals either finds no violation of the respective orders or orders enforcement thereof.

We have shown above that its volume discount schedule is of no advantage to United, since its use merely reduces the competitive disadvantage under which United competes with the dominant seller in the industry when it, too, gives such discounts. *Thus, if this request for a stay of the order is granted, United will withdraw its petition for certiorari.*

The Commission will lose nothing by granting this request. To force United alone to give up volume discounts will not only impair competition in the industry, but will encourage National and Sunshine to retain their volume discount schedule as long as possible to pirate as much of United's business as it is possible for them to capture on that basis.

THE QUICK SOLUTION

This is an industry problem. For over twenty years, volume discounts have permeated this industry. What is needed now is an early determination by the Commission of whether or not such volume discounts are permissible in this industry, and, if they are, what form and magnitude of volume discounts are permissible. For a prompt solution to the issue, and, we believe, the achievement of competition in this industry based on the competitive factors applicable to each individual item in the line, an industry conference of the three largest sellers is called for. If the three largest sellers abandon volume discounts they will promptly disappear from the industry. Indeed, if National alone gives up volume discounts, such discounts will disappear from the industry.

The Commission's argument to the Court of Appeals in the *United* case, and the Court's decision in that case, are to the effect that in this industry these volume discounts are *per se* illegal (unless cost justified). See also *Dean Milk Company, supra.* National and Sunshine might be told, we suggest, that the Commission means business and that the twenty years of study are over. United would hope this would mean an end to volume discounts in this industry; United's response to such a course of action is stated above.

PRECEDENTS

The Commission has exercised its discretionary authority to assure equality of relief against two or more competitors in a single industry. See the *Carpet Cases,* Dockets 7420, 7421, 7631, 7632, 7633, 7636, 7637, and 7638; the *Shaver Cases,* Dockets 6892, 6701, and 6900; *Chesebrough-Ponds, Inc.,* Docket 8491; *Union Carbide Corporation,* Docket 8492; *Atlantic Products Corporation,* Docket 8513; *Schulze and Burch Biscuit Company,* Docket 7452; and the *Garment Cases,* see F.T.C. Press Release of August 12, 1965. *Cf.*

Universal-Rundle v. *Federal Trade Commission*, CA 7, Number 14,763, Opinion October 22, 1965.

CONCLUSION

United respectfully requests that the effective date of the foregoing order against it be stayed until there is compliance by National and Sunshine with the orders heretofore issued against them. Seven copies of this application are filed with the Secretary, with the request that he forward a copy to each Commissioner. We respectfully request an informal conference with the Commission on this application at its early convenience. We are also transmitting copies of this application to Joseph E. Sheehy, Esquire, Director, Bureau of Restraint of Trade, and James B. Truly, Esquire, Assistant General Counsel for Appellate Matters, with the hope that we may discuss this matter with them informally, in advance of meeting with the Commission, so that the Commission may have the benefit of their views.

Respectfully submitted,

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